No. 82-1402

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOCAL DIVISION 1028, AMALGAMATED TRANSIT UNION,

Petitioner,

v.

THE CITY OF AURORA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

In *Local Division 1285, Amalgamated Transit Union* v. *Jackson Transit Authority*, —— U.S. ——, 102 S. Ct. 2202 (1982), this Court ruled that § 13(c) of the Urban Mass Transportation Act of 1964 did not transmute an ordinary breach of contract action into a federal claim. Did this Court also rule in *Jackson* that, when the elements of a substantial violation of the Contract Clause of the U.S. Constitution are presented, a party to a contract contemplated by § 13(c) is precluded from presenting its contract clause claim in federal court.

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IN THE

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LOCAL DIVISION 1028, AMALGAMATED TRANSIT UNION,

Petitioner,

v.

THE CITY OF AURORA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Local Division 1028, Amalgamated Transit Union (the "Union"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on August 25, 1982.

OPINIONS BELOW

The summary opinion of the Court of Appeals, not reported, appears in the Appendix (hereinafter designated "App.") at A1-A3. The opinion of the District Court for the Northern District of Illinois, not reported, appears at B1-B2.

JURISDICTION

The judgment of the Court of Appeals was entered on August 25, 1982 (App. A1). A timely petition for rehearing *en banc* was denied on November 17, 1982, (App. C1), and this petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article I, § 10 provides:

> Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.
>
> No State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports,

except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

United States Code, Title 49, § 1609(c) provides:

"It shall be a condition of any assistance under section 3 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provision as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of the Act of February 4, 1887 (24 Stat. 379), as amended. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements."

STATEMENT OF THE CASE

In this case, the Union has sought to present its claim that the Respondent, City of Aurora, Illinois (hereinafter "Aurora"), violated the contract clause of the U.S. Constitution when it passed legislation impairing the obligations contained in its contracts with the Union. The contracts involved in the dispute were labor protective agreements concluded to satisfy § 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1609(c) (hereinafter "§ 13(c)"). This dispute arose during this Court's consideration of *Jackson, supra;* accordingly, this case presents the question of whether this Court's decision in *Jackson* also precludes the Union from raising its constitutional claims against Aurora in federal court.

The facts are straightforward. Since 1971, when the City of Aurora took over the local private transit system with federal UMTA funds, Aurora and the Union have been parties to labor protective agreements required by § 13(c).[1] The

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1. As this Court found in *Jackson*:

> Section 13(c) requires, as a condition of federal assistance under the Act, that the Secretary of Labor certify that "fair and equitable arrangements" have been made "to protect the interests of employees affected by [the] assistance." The statute lists several protective steps that must be taken before a local government may receive federal aid; among these are the preservation of benefits under existing collective bargaining agreements and the continuation of collective bargaining rights. The protective arrangements must be specified in the contract granting federal aid. [footnotes omitted].
>
> * * *
>
> . . . § 13(c) contemplates protective arrangements between grant recipients and unions as well as subsequent collective bargaining agreements between those parties, see H.R. Rep. No. 204, 88th Cong., 1st Sess., 16 (1963). . . .

Id., at 2204, 2206.

Agreements (hereinafter, the "§ 13(c) Agreements") provided that Aurora recognize the Union as the collective bargaining representative of its transit employees; that Aurora would continue to bargain collectively with the Union over the terms and conditions of employment and that labor disputes between the parties, including the making of collective bargaining agreements and the terms and conditions to be included in such agreements, would be submitted to binding arbitration. Aurora submitted this agreement to the U.S. Secretary of Labor, who certified to the U.S. Secretary of Transportation that Aurora had met the requirements of § 13(c) to qualify for federal funds, and Aurora received the money.

Since 1971, the Union did represent Aurora's transit employees, and Aurora and the Union did bargain collectively as provided in the § 13(c) Agreement. However, in 1982, when the parties were unable to agree to a new collective bargaining agreement, the City Council of Aurora passed and approved Resolutions Nos. 82-1147 and 82-1160 which, *inter alia,* authorized the Mayor to notify the Union that its collective bargaining agreement with the city and "its recognition as representative" of a unit of Aurora's employees "shall be terminated" and which adopted personnel policies unilaterally establishing the wages, hours and conditions of employment of the employees represented by the Union, thus terminating collective bargaining with the Union. The personnel policies Aurora adopted altered the rights, privileges and benefits unilaterally, rather than through collective bargaining or arbitration and did not provide for any further Union representation of Aurora's transit employees.

The Union sued the City of Aurora, alleging that Aurora's enactment of the two City Council Resolutions abrogating the affirmative provisions of its existing § 13(c) Agreements violated the contract clause of the U.S. Constitution, Article I, § 10.[2] The district court dismissed the Union's action in a summary one paragraph order. Confronted with Aurora's termination of its collective bargaining status, the Union petitioned the Court of Appeals for the Seventh Circuit for an injunction pending appeal. Acting on the injunction papers alone, without notice to the appellant Union, briefs, or oral argument, the court of appeals summarily affirmed the district court's ruling on the merits. The court held:

> The Union seeks judicial review of the action taken by the City of Aurora in May 1982, in which the City passed Resolution Nos. R82-1147 and R82-1160 withdrawing recognition from the Union as the collective bargaining representative of Aurora's transit workers. The Union claims that these actions by the City violate the contract clause of the United States Constitution, article I, § 10.
>
> There are two possible contracts that might have been violated. The first, was an agreement entered into pursuant to § 13(c) of the Urban Mass Transportation Act of 1964 which requires that a state or local government make arrangements to preserve transit workers' existing collective-bargaining rights before

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2. Prior to this Court's ruling in *Jackson, supra,* the Union had also claimed that Aurora's action violated the § 13(c) Agreement as a federal contract under *Division 519, A.T.U.* v. *LaCrosse,* 585 F. 2d 1340 (7th Cir. 1978), which was, at that time, binding precedent in the Seventh Circuit. The Union does not seek review of dismissal of that claim.

> that government may receive federal financial assistance. That agreement in this case is known as the parties' "1971 § 13(c) Agreement." The United States Supreme Court has recently held in *Jackson Transit Authority* v. *Local Division 1285, Amalgamated Transit Union*, —— U.S. ——, 102 S. Ct. 2202 (June 7, 1982), that § 13(c) does not provide a union with federal causes of action for alleged breaches of the § 13(c) and collective bargaining agreements. Such agreements are to be governed by state law applied in state courts.
>
> • • •
>
> For these reasons we summarily affirm the district court order of July 22, 1982, in which the district court found that there was no federal jurisdiction over the § 13(c) agreement and there was no impairment of the Union contract rights in violation of the contract clause of the Constitution, article I, § 10. The district court found that plaintiff had failed to state a cause of action, denied injunctive relief and dismissed the case.

(App., pp. A. 2-3). On November 17, 1982, the court denied the Union's Petition to grant it a Hearing, for Rehearing and Rehearing *En Banc.*

The court of appeals held, in short, that this Court's decision in *Jackson, supra,* stripped the "ordinary enforceable contracts" (*Id.,* at 2207) concluded to satisfy § 13(c) of the protections of the contract clause afforded all other contracts. Indeed, the court of appeals apparently felt so certain that this Court's *Jackson* decision withdrew the protections of the contract clause from § 13(c) Agreements that the court summarily affirmed the district court's dis-

missal of the Union's constitutional claim without briefs or oral argument even on that point.[3]

REASONS FOR GRANTING THE WRIT

1. This Decision Involves Only The Narrow, But Important, Question of Whether *Jackson* Barred Parties to a § 13(c) Agreement from Making Constitutional Claims.

In *Jackson*, did this Court bar the federal courts from considering whether the contract clause protects the "ordinary, enforceable contracts" concluded to fulfill the requirements of federal law? The court of appeals ruled summarily, without benefit of briefs or oral argument, to affirm the dismissal of the Union's claim. In its summary opinion, the court cited only to *Jackson*, resting its ruling solely and entirely on this Court's statement in *Jackson* that "§ 13(c) does not provide a union with federal causes of action for alleged breaches of the § 13(c) and collective bargaining agreements. Such agreements are to be governed by state law applied in state courts."

Whether *Jackson* withdrew the protections of the contract clause from § 13(c) agreements is, of course, completely and solely controlled by *Jackson*. As will be set

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3. In summarily affirming the district court without notice to the parties and without briefs or oral argument the lower court violated the Federal Rules of Appellate Procedure, Rules 31 (Filing and Service of Briefs) and Rule 34 (Oral Argument), and Seventh Circuit Rule 14(f), which require, at minimum, that parties be notified and allowed "to file a statement setting forth the reasons why, in its opinion, oral argument should be heard." By these summary procedures, the lower court denied the Union the meaningful opportunity to argue about questions presented here, including the application of *Jackson*, giving rise to this Petition.

forth below, this Court in *Jackson* neither could nor did address or decide whether contracts concluded to satisfy § 13(c) should be excluded from the protection of the contract clause, where it would otherwise apply. Accordingly, the decision below should be reversed.

2. The Decision Below Erroneously Held That This Court Strips Litigants of Their Constitutional Rights by Silence.

In *Jackson*, this Court decided that the provisions of a § 13(c) Agreement, an "ordinary' "enforceable" contract, did not "state federal claims." (*Id.*, at 2207). In reaching this decision, the Court readily recognized the § 13 (c) Agreement as an enforceable contract, noting that suits for enforcement of contract provisions are ordinarily cognizable in state court (*Id.*, at 2207). This Court then considered and rejected the Union's contention that Congress, in enacting § 13(c), had intended to transmute such otherwise non-federal contract actions into federal claims. Thus, this Court decided that the parties to a contract mandated by § 13(c) of the federal UMTA would have no greater federal rights than any other ordinary contracting parties.

However, this Court nowhere said that the parties to a contract concluded to satisfy federal law would have *fewer* rights than any other contracting party. The contract clause is the crucial federal protection for contracts against the otherwise unlimited capacity of the sovereign to legislate itself out of its commitments in pursuit of its perceived "self interest." *U.S. Trust* v. *New Jersey*, 431 U.S. 1, 26

(1977). This Court's conclusion that § 13(c) agreements are "ordinary, enforceable contracts" implies their entitlement at least to claim the protections of the contract clause against legislative impairment. *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87 (1810); *U.S. Trust, supra; Sonoma County Employees* v. *County of Sonoma*, 23 Cal. 3d 296, 591 P. 2d 1 (1979).[4]

Because it apparently thought that this Court had decided in *Jackson* that § 13(c) Agreements are not entitled to protections of the contract clause, the court below did not even consider whether § 13(c) Agreements *should* be so treated. Just recently, in *Carlson* v. *Green*, 446 U.S. 141 (1980), and *Davis* v. *Passman*, 442 U.S. 228 (1979), this Court has held that the loss of Constitutional rights is not to be thus lightly presumed. Indeed, the Union was unable to locate a single case in which this Court held that Congress' failure to create federal *statutory* claims in a particular litigant also deprived that party of any claims he might have stemming from the *Constitution*.[5]

Accordingly, unless this Court explicitly withdrew these 13(c) contracts from their fundamental Constitutional status, the Union's Constitutional claim remains.

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4. In each of these cases, as here, the rights established by the contractual relationship were private, state, common law, contract rights, enforceable, absent state legislative impairment, only in the courts of the fifty states. In each case, the contract clause applied.

5. The Union does not ask this Court to decide its contract clause claim here; the Union asks this Court only to require the lower courts to consider its claim.

3. The Decision Below Erroneously Held That, in *Jackson*, this Court Stripped § 13(c) Agreements of the Protections of the Contract Clause.

In the course of its short opinion, this Court reiterated several times the issue it confronted in *Jackson:*

> . . . [whether] § *13(c) by itself* permits a union to sue in federal court for alleged violations of an arrangement of this kind or of the collective bargaining agreement between the union and the local government transit authority. (*Id.*, at 2204).
>
> . . . [whether] the union's contract actions are federal causes of action . . . (*Id.*, at 2206).
>
> . . . we determine the scope of rights and remedies *under a federal statute* (*Id.*, at 2207) (emphasis added).

This Court never said, nor even intimated, that the contracts in *Jackson* were to be excluded from any otherwise applicable protections of the U.S. Constitution. Indeed, this Court explicitly noted that sources of federal claims and jurisdiction not presented in *Jackson* would remain available to the parties. (*Id.*, at 2210, n. 11).

The result below is not only unsupported by *Jackson*, it is completely inconsistent with the assumptions on which *Jackson* necessarily rests. In *Jackson*, this Court recognized that Congress could accomplish its end of protecting employees by compelling states to conform their laws to § 13(c) as a condition of the receipt of federal funds and that Congress had contemplated that the ensuing legal protections would be embodied in ordinary, enforceable contracts. Absent action by the contracting sovereign to legislate away its contractual commitments to collective

bargaining, of course the contracts would be enforceable as a local matter, as this Court noted in *Jackson*. However, should the sovereign be free to take the money and then legislate itself out of its commitments, the protections concluded to qualify for federal money would be meaningless and Congress' scheme rendered a nullity. Accordingly, insofar as *Jackson* addresses any matter bearing on the contract clause issue, *Jackson* supports the Union's claim.

Nor could this Court have ruled in *Jackson* that Plaintiff could not state a claim for violation of the contract clause of the U.S. Constitution. One, the facts in *Jackson* did not comprise a contract clause violation. Only appropriate legislative action by the state or its agencies generates a contract clause claim. *Nachman* v. *Pension Benefit Guaranty Corporation*, 592 F. 2d 947 (7th Cir. 1979), *aff'd.*, 446 U.S. 359 (1981). In *Jackson*, the State of Tennessee did not legislate the impairment of the Union's contract rights. Here, Aurora did.

Two, the parties in *Jackson* did not contend that the employer, City of Jackson, had violated the contract clause. To the contrary, the City's own Brief on the Merits to this Court accurately reflects affirmative exclusion from that case of any issue of state legislated impairment.[6] Under

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6. The City told this Court in *Jackson:*

> . . . *Tennessee state law is neither facially unconstitutional nor in any way hostile to the continuation of collective bargaining between the parties, or to the enforcement of § 13(c) agreements and valid collective bargainng agreements.* Tenn. Code Ann. § 6-3802. (Petitioners' Reply Brief on the Merits, *Jackson, supra*, at 19, n. 20). (App. p. D3) (emphasis added).

Rule 23 of this Court's rules[7], this Court will not take up questions not presented by the parties, and this Court has repeatedly so ruled.[8]

Nor was any such contention presented to or passed on by the lower courts. See *Division 1285, Amalgamated Transit Union* v. *Jackson Transit Authority, and the City of Jackson*, 447 F. Supp. 88 (W.D. Tenn. 1977), *rev'd*, 650 F. 2d 1379 (6th Cir. 1981). Generally, this Court also refuses to take up questions not considered below.[9]

In sum, the court below erred in attributing the decision of the case before it to this Court.

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7. "Only the questions set forth in the petition or fairly comprised therein will be considered by the court." Rule 23(c)(1), Rules of the Supreme Court.

8. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 177-178 (1938). *See also J-R Distributors, Inc.* v. *Washington*, 428 U.S. 949, 950 (1974) (opinion of White, J.); *Mayor* v. *Educational Equality League*, 415 U.S. 605, 623 (1974); *United States* v. *Bass*, 404 U.S. 336, 339, n. 4 (1971); *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 428-429 (1964); *Namet* v. *United States*, 373 U.S. 179, 190 (1963); *Mazer* v. *Stein*, 347 U.S. 201, 206, n. 5 (1954); *National Licorice Co.* v. *Labor Board*, 309 U.S. 350, 357, n. 2 (1940); *Rorick* v. *Devon Syndicate*, 307 U.S. 299, 303 (1939). *And see United States* v. *Richardson*, 418 U.S. 166, 206, n. 3 (1974) (dissent).

9. *California* v. *Taylor*, 353 U.S. 553, 557, n. 2 (1957). *See also United States* v. *Santana*, 427 U.S. 38, 41, n. 2 (1975); *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975); *Ramsey* v. *United Mine Workers*, 401 U.S. 302, 312 (1971); *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330 (1967); *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16 (1958).

CONCLUSION

The scope of *Jackson* is uniquely within this Court's competence to decide, and, as set forth above, *Jackson* did not decide the questions presented here. Accordingly, this Court should grant *certiorari,* and this case should be reversed and remanded to the court below for full consideration of the questions presented. Because this issue is so narrow and turns so completely on this Court's intentions in *Jackson,* this Court may wish to consider summary reversal.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 25, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

No. 82-2234 LOCAL DIVISION 1028, AMALGAMATED TRANSIT UNION, *Plaintiff-Appellant,* vs. THE CITY OF AURORA, *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 82-C-3087 Judge Charles P. Kocoras

The court has considered the following documents:

1. The "MOTION FOR AN INJUNCTION PENDING APPEAL" filed on August 3, 1982, by counsel for the plaintiff-appellant;

2. The "PLAINTIFF-APPELLANT'S MEMORANDUM IN SUPPORT OF MOTION FOR AN INJUNCTION PENDING APPEAL" filed on August 3, 1982;

3. The "APPENDIX TO MOTION FOR AN INJUNCTION PENDING APPEAL" filed on August 3, 1982, by counsel for the plaintiff-appellant;

4. The "RESPONSE TO MOTION FOR INJUNCTION PENDING APPEAL" filed on August 13, 1982, by counsel for the defendant-appellee;

5. The "COMPLAINT" filed in the dist. ct. on May 18, 1982, by counsel for the plaintiff;

6. The "PLAINTIFF-APPELLANT'S MOTION FOR LEAVE TO FILE A REPLY BRIEF IN SUPPORT OF ITS MOTION FOR AN INJUNCTION PENDING APPEAL" filed on August 16, 1982;

7. The "PLAINTIFF-APPELLANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR AN INJUNCTION PENDING APPEAL" received on August 16, 1982.

IT IS ORDERED that plaintiff-appellant's motion for leave to file a reply brief in support of its motion for an injunction pending appeal is GRANTED and the clerk is directed to file the reply brief instanter.

The Union seeks judicial review of the action taken by the City of Aurora in May, 1982, in which the City passed Resolution Nos. R82-1147 and R82-1160 withdrawing recognition from the Union as the collective bargaining representative of Aurora's transit workers. The Union claims that these actions by the City violate the contract clause of the United State Constitution, article I, § 10.

There are two possible contracts that might have been violated. The first, was an agreement entered into pursuant to § 13(c) of the Urban Mass Transportation Act of 1964 which requires that a state or local government make arrangements to preserve transit workers' existing col-

lective-bargaining rights before that government may receive federal financial assistance. That agerement in this case is known as the parties' "1971 § 13(c) Agreement." The United States Supreme Court has recently held in *Jackson Transit Authority* v. *Local Division 1285 Amalgamated Transit Union*, —— U.S. ——, 102 S. Ct. 2202 (June 7, 1982), that § 13(c) does not provide a union with federal causes of action for alleged breaches of the § 13(c) and collective bargaining agreements. Such agreements are to be governed by state law applied in state courts.

The second agreement that may have been violated was the collective bargaining agreement between the Union and the City. This contract, by its terms, expired on September 30, 1981. Article XXXVIII of that agreement further provided that should the parties fail to reach an agreement in negotiating a new agreement, that the Federal Mediation and Conciliation Service and any State agency established to mediate and conciliate disputes within the state shall be notified of the dispute and "in the event the parties reach an impasse during or after mediation, either party may terminate this Agreement upon ten (10) days written notice." There was no binding arbitration clause in this agreement. There was no contract once the City notified the Union of its intention to terminate.

For these reasons we summarily affirm the district court order of July 22, 1982, in which the district court found that there was no federal jurisdiction over the § 13(c) agreement and there was no impairment of the Union's contract rights in violation of the contract clause of the Constitution, article I, § 10. The district court found that plaintiff had failed to state a cause at action, denied injunctive relief and dismissed the case.

AFFIRMED.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable CHARLES P. KOCORAS.

Cause No. 82 C 3087.

Title of Cause: Local Division 1028 vs. The City of Aurora.

Brief Statement of Motion: Order.

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and address of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel:

.....

.....

Representing:

.....

.....

Names and Addresses of other counsel entitled to notice and names of parties they represent:

.....

.....

Reserve space below for notations by minute clerk

Plaintiff's motion for a preliminary injunction is denied. The United States Supreme Court has recently held explicitly that claims under Section 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. 1609(c), fail to state a federal couse of action. Jackson Transit Authority vs. Local Division 1285 Amalgamated Transit Union, AFL-CIO-CLC, —— U.S. ——, (Slip Opinion 81-411, June 4, 1982). Nor does the action of the Aurora City Council in passing the Resolution of May 4 and May 18, 1982 "impair" the plaintiff's contract rights in violation of the Contract Clause of the United States Constitution, Article I, 10. Moreover, Jackson, supra, expressly held that "42 U.S.C. 1983 (does not) permit the union to bring suit" in a federal court for breach of a 13(c) agreement. See Jackson, supra, at 14 n. 12. Accordingly, this court finds that plaintiff has failed to state a cause of action, and therefore has no liklihood of prevailing on the merits of its claim. The motion for preliminary injunction is denied, and this case is dismissed. Oral motion for .....
Stay pending appeal is denied.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

November 17, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

No. 82-2234 LOCAL DIVISION 1028, AMALGAMATED TRANSIT UNION, *Plaintiff-Appellant,* vs. THE CITY OF AURORA, *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 82 C 3087 Charles P. Kocoras, Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Local Division 1028, Amalgamated Transit Union, Plaintiff-Appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It is ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

D1

No. 81-411

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JACKSON TRANSIT AUTHORITY AND THE CITY OF JACKSON, TENNESSEE,

Petitioners,

v.

LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, ALF-CIO-CLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONS' REPLY BRIEF ON THE MERITS

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has demonstrated great difficulty in identifying the "statutory right" which it alleges may have been breached, variously defining it as the "right to enforce [collective bargaining agreements] as a matter of federal law . . .," Resp. Br. at 23, the "right to federal enforcement of collective bargaining agreements as part of the 'collective bargaining rights' that § 13(c)(2) preserves," *id.* at 24, the "right . . . to have its collective bargaining agreement remain in effect," *id.*, and the "right to continued collective bargaining," *id.* at 35. The Union has encountered this definitional difficulty because UMTA § 13(c) contains no "right or duty-creating language," *Cannon* v. *Univ. of Chicago*, 441 U.S. at 690 n.13, and, instead, merely gives the Secretary of Labor a directive, typical in federal funding statutes, to withhold federal monies if he finds that certain "fair and equitable arrangements" are not made. *Compare* Resp. Br. at 22. Absent such a statutorily defined right, the Civil Rights Act, 42 U.S.C. § 1983, is simply inapplicable.[20]

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20. Any interest the Union may have in the Secretary of Labor's compliance with § 13(c)'s directive to him is simply not a "right . . . secured by the . . . laws" of the United States within the meaning of 42 U.S.C. § 1983. *Cf. Pennhurst State Sch. & Hosp.* v. *Halderman*, —— U.S. ——, 101 S. Ct. 1531, 1545 (1981). Moreover, that interest was fully satisfied when the Secretary of Labor certified the parties' § 13(c) agreement, some 15 years ago, as a condition of the single direct grant which Jackson received under UMTA.

Furthermore, one may question whether the 42nd Congress ever meant to reach the present situation, when it recodified § 1983. In reviewing the legislative history of

(Footnote continued on next page)

As District Judge Wellford correctly found in this case, this "suit is not basically concerned with the validity or construction of a federal statute or the action taken by an administrative officer or agency under the provisions of the federal statute." *Local Div. 1285, etc.* v. *Jackson T.A.*, 447 F. Supp. 88, 94 (W.D. Tenn. 1977). Rather, this "lawsuit . . . is at bottom an action on a contract and not

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(Footnote continued from preceding page)

§ 1983, which surely contained no reference to collective bargaining agreements or federal funding of urban mass transit, the Court noted in *Monroe* v. *Pape*, 365 U.S. 167, 81 S. Ct. 473 (1961), and again last term in *Allen* v. *McCurry*, 449 U.S. 90, 101 S. Ct. 411, 418 (1980), "that Congress had intended a federal remedy [under § 1983] in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. . . . In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights." None of these circumstances are presented in this case. First, as noted throughout these proceedings, UMTA § 13(c) itself creates no federal rights in favor of the Union. Second, Tennessee state law is neither facially unconstitutional nor in any way hostile to the continuation of collective bargaining between the parties, or to the enforcement of § 13(c) agreements and valid collective bargaining agreements. Tenn. Code Ann. § 6-3802. The Union's real basis for its resort to federal court is hardly a legal basis at all, but rather a general distrust of the state courts. *See Allen* v. *McCurry*, 101 S. Ct. at 420. Yet, there is no evidence that Tennessee state courts are any less willing than Tennessee federal courts to do their mortal best to administer justice and resolve the parties' disputes fairly and impartially. *See* Pet. Br. at 37 n.47.

an action on a statutory violation." *Local Div. 732, etc.* v. *M.A.R.T.A.*, 667 F. 2d at 1332. *See also* Resp. Br. at 4 (describing the "collective bargaining agreement, which is the subject of this lawsuit, [as] a garden variety collective bargaining agreement . . ."). Private contracts rights, of course, are not among the "rights . . . secured by the . . . laws" of the United States, 42 U.S.C. § 1983. *Id.* at 1345-46.[21]

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21. It is worth noting that before the 11th Circuit "the Union [did] not argue, and the legislative history belies, that there is any remedy, implied or otherwise, for the statutory violation the Union alleges. Thus, under the Union's theory, a plaintiff alleging a violation of UMTA § 13(c) agreement can seek no remedy other than the common law remedies for breach of the underlying 13(c) agreement. The irony of the Union's theory is apparent: a party aggrieved by a breach of a 13(c) agreement being limited to common law contract remedies, will allege the statutory violation solely as a jurisdictional device." *Local 732, supra* at 1331. The "right to federal enforcement of collective bargaining agreements as part of the 'collective bargaining rights' that § 13(c)(2) preserves," which the Union asserts in its brief, Resp. Br. at 24, is simply a purported right to federal jurisdiction. That "right" cannot be the predicate for the assumption of jurisdiction under U.S.C. § 1331, and cannot be a "right" within the meaning of 42 U.S.C.

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No. 82-1402

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOCAL DIVISION 1028, AMALGAMATED TRANSIT UNION,

Petitioner,

v.

THE CITY OF AURORA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT CITY OF AURORA, ILLINOIS IN OPPOSITION

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I. QUESTIONS PRESENTED

The City of Aurora, Illinois disagrees with the petitioner's version of questions presented and respectfully submits that the following is the only question presented for review:

Does a controversy involving a municipal labor contract entered into pursuant to § 13(c) of the Urban Mass Transportation Act, which is otherwise not cognizable in Federal Court according to this Court's decision in *Jackson Transit Auth. v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982), state a Federal cause of action simply because the municipality's denial of its alleged contractual obligations takes the form of City Council resolution authorizing the Mayor to terminate the contract?

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No. 82-1402

IN THE

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OCTOBER TERM, 1982

LOCAL DIVISION 1028, AMALGAMATED TRANSIT UNION,

Petitioner,

v.

THE CITY OF AURORA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT CITY OF AURORA, ILLINOIS IN OPPOSITION

OPINION BELOW

The Respondent adopts the statement in the Petition for Certiorari.

JURISDICTION

The Respondent adopts the statement in the Petition for Certiorari insofar as it is based on this Court's holding

that a Federal Court has jurisdiction to determine if an action for breach of a § 13(c) Agreement states a federal cause of action. *Jackson Transit Auth. v. Local Division 1285*, 457 U.S. 15 (1982). However, Respondent questions whether federal jurisdiction exists in this case insofar as it is premised on the Union's claim under Article 1, § 10, United States Constitution, for the reasons set forth in "Reasons for Denying the Writ," infra.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Respondent adopts the statement in the Petition for Certiorari.

STATEMENT OF THE CASE

In this case, the Union sought to convert a cause of action for breach of its § 13(c) Agreement which is "governed by state law applied in state courts", *Jackson Transit Authority v. Local Division 1285*, 457 U.S. 15, n. 13 (1982) into a federal cause of action. The Union's claim is that since the alleged breach took the form of city council resolutions authorizing termination of the contract, those resolutions give rise to a claim under the contract clause, Article 1, § 10, United States Constitution.

In 1971, the City of Aurora, Illinois ("Aurora") took over a local private transportation system. On September 25, 1971, Aurora and the Union entered into an agreement pursuant to the requirements of § 13(c) of the Urban Mass Transportation Act ("UMTA"). The Agreement (hereinafter referred to as "the 1971 § 13(c) Agreement") provided that Aurora recognize the Union; that Aurora bargain collectively with the Union over the terms and conditions of employment; and that labor disputes between the parties, including the terms and conditions to be included in collective bargaining agreements, would be submitted

to binding arbitration. The 1971 § 13(c) Agreement was submitted to the U.S. Secretary of Labor, who certified to the U.S. Secretary of Transportation that the requirements of § 13(c) were satisfied and that Aurora was qualified for federal funds. Thereafter Aurora received the federal funds.

Since 1971, Aurora and the Union have entered into a number of collective bargaining agreements. The last such agreement was entered into on March 4, 1980 and, by its terms, expired on September 30, 1981. Art. XXXVIII of the agreement provided that ". . . in the event the parties reach an impasse during or after mediation, either party may terminate this Agreement upon ten (10) days written notice." There was no binding arbitration clause in this latest agreement.

From September, 1981 through April, 1982, the parties bargained and attempted to reach a new collective bargaining agreement. During this bargaining period the 1980 agreement was continued in effect.

In a letter, dated April 9, 1982, Aurora presented the Union with its "final and best offer" and informed the Union that unless the offer was ratified by the Union by April 27, 1982, the offer would be withdrawn and the 1980 agreement would be terminated. The Union rejected Aurora's offer.

On April 26, 1982, the Union notified Aurora that it was invoking paragraph 6 of the 1971 § 13(c) Agreement and submitting their labor dispute over the terms and conditions to be included in the new collective bargaining agreement to a board of arbitrators for binding arbitration. Aurora declined to engage in such arbitration.

On May 4, 1982, the City Council of Aurora passed and approved Resolution No. R82-1147 which provided, in part, as follows:

> Be it resolved that the Mayor is hereby authorized to provide written notice to Division 1028 of the Amalgamated Transit Union that its recognition as representative of certain transportation department employees and its labor agreement with the City of Aurora, covering said employees and dated March 4, 1980, shall be terminated effective 12:01 a.m., May 19, 1982.

On May 5, 1982, Mayor Jack Hill of Aurora, by letter, notified the Union as follows:

> By authority of City Resolution adopted May 4, 1982, and pursuant to the provisions of Article XXXVIII of the Labor Agreement dated March 4, 1980, between the City of Aurora and Division 1028 of the Amalgamated Transit Union, I am writing to notify you that the City does hereby terminate said labor agreement, effective 12:01 a.m., May 19, 1982.
>
> We will be pleased to rescind this notification if the Aurora members of your Division have ratified the City's final proposal by the termination date. Otherwise, the City Council will adopt personnel policies establishing wages, hours and working conditions for the employees of the Aurora Transportation Department.

Rather than accept this offer, the Union sued the City of Aurora in United States District Court alleging that the actions of the City violated § 13(c) of UMTA.[1] Suit was filed before this Court's decision in *Jackson, supra*. After the decision in *Jackson*, the Union amended its complaint to allege that Aurora's enactment of the City Council resolutions violated the contract clause of the United States Constitution, Art. 1 § 10. The District Court

[1] On May 18, 1982, the City Council adopted Resolution No. R82-1160 to implement its decision to terminate the contract in which it established wages, hours and conditions of employment for its transit workers.

dismissed the Union's action in a summary one paragraph order which provided as follows:

> The United States Supreme Court has recently held explicitly that claims under Section 13(c) of the Urban Mass Transportation Act of 1964, 49 USC 1609(c) failed to state a federal cause of action. *Jackson Transit Authority v. Local Division 1285 Amalgamated Transit Union, AFL-CIO-CLC,* ___ U.S. ___, (Slip Opinion 81-411, June 4, 1982). Nor does the action of the Aurora City Council in passing the resolution of May 4 and May 18, 1982 'impair' the plaintiff's contract rights in violation of contract clause of the United States Constitution, Article 1, 10. Moreover, *Jackson, supra,* expressly held that '42 USC 1983 (does not) permit the Union to bring suit in a federal court for breach of a 13C agreement.' *See Jackson, supra,* at 14 n. 12. Accordingly, this Court finds that plaintiff has failed to state a cause of action, and therefore has no likelihood of prevailing on the merits of its claim. The motion for preliminary injunction is denied, and this case is dismissed."

The Union appealed. On its appeal, the Union petitioned the Court of Appeals for the Seventh Circuit for an injunction pending appeal. Acting on the request for injunction, the Court of Appeals summarily affirmed the District Court's ruling on the merits, in an unreported opinion (Pet. App., pp. A. 2-3). On November 17, 1982, the court denied the Union's Petition to grant it a Hearing, for Rehearing and Rehearing En Banc.

REASONS FOR DENYING THE WRIT

The Petition for Certiorari should be denied by this Court because the decision of the Court of Appeals is correct; the decision is in conformity with the decision of other circuits which have denied the same contract clause claim made by the Union, *Local Div. 589 A.T.U. v. Massachusetts,* 666 F.2d 618 (1st Cir. 1981), *cert. den.,* ___ U.S. ___, 102 S. Ct. 2948 (1982); and, further, Respondent

submits that neither the decision below nor the record raises the question presented in the Petition.

This case is but a simple breach of contract case. The Union alleges that the 1971 § 13(c) Agreement between the Union and Aurora is a valid and subsisting agreement; that it has not been superseded by subsequent collective bargaining agreements, including the 1980 agreement which, by its terms was terminable by either party; and that the 1971 § 13(c) Agreement obligates Aurora to recognize the Union as a bargaining agent and to engage in interest arbitration with the Union.

Aurora, on the other hand, denies that the 1971 § 13(c) Agreement was intended by the parties to be perpetual in nature; that the 1971 § 13(c) Agreement was superseded by subsequent collective bargaining agreements, including the 1980 agreement; that Aurora had no obligations to the Union beyond those imposed in the 1980 collective bargaining agreement, with which it has complied; and, that since the 1980 agreement, by its terms, could be terminated by Aurora and was so terminated, there is no contractual duty owed by Aurora to the Union.

Both sides may well have substantial arguments, on the merits, as to the rights and duties imposed on each by the 1971 § 13(c) Agreement. But, as this Court definitively held in *Jackson, supra,* the parties' respective arguments must be presented to, and weighed by, a state court and not a federal court. ". . . Congress made it absolutely clear that it did not intend to create a body of federal law applicable to labor relations between local government entities and transit workers," *Jackson, supra, n. 9.* Because of this clear Congressional intent, the Union is not permitted to bring a federal suit and the Union's sole judicial remedy for alleged violation of a § 13(c) Agreement is to ". . . pursue a contract action in state court." *Jackson, supra,* n. 13.

The Union, however, has attempted to convert this state claim into a federal claim by artfully pleading, in its amended complaint, that the City of Aurora violated the contract clause, Art. 1, § 10, United States Constitution, when it allegedly breached the 1971 § 13(c) Agreement. The Union bases its argument on the fact that Aurora's refusal to comply with the 1971 § 13(c) Agreement took the form of a City Council resolution authorizing its mayor to terminate the Union's recognition as bargaining agent.

The Union's argument is disingenuous.

The contract clause applies only to state legislative acts, not to state judicial acts or to national legislation. See, generally, *Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924). Here, there has been no legislative act by the State of Illinois. Whatever state law governed the construction of the § 13(c) agreement before Aurora terminated the contract remains the state law to be applied by a state court in construing that agreement. Indeed, the Union's Complaint contains a Count, based upon "pendent jurisdiction," in which it is forcefully alleged that Aurora's termination is unlawful as a matter of Illinois state law.

The Aurora City Council's resolutions do not amount to a "law" within the meaning of Art. 1, § 10 of the United States Constitution which forbids "laws impairing the obligation of contracts." Of course, a municipal ordinance may be such an exercise of state delegated legislative power and have such a force of law within the municipal limits that it may properly be considered a "law" within the meaning of Art. 1, § 10. *Eg., New Orleans Water-works Co. v. Louisiana Sugar Ref. Co.*, 125 U.S. 18 (1888).

However, the Aurora resolutions in this case are not such ordinances. They do not change contract law in Illinois. They do not change contract law in Aurora. They do not declare § 13(c) agreements to be unlawful or

unenforceable. Rather, these resolutions do no more than authorize the Mayor to cease recognizing the Union as a bargaining agent and to terminate the City's contractual relationship with that Union. Resolutions such as these undoubtedly proceed or accompany any municipality's actions with respect to any § 13(c) agreement.

The Union's contention, therefore, is that Aurora refused to perform a contract and, since Aurora is a municipal corporation and that refusal was embodied in the form of a resolution, the resolution is a law impairing the obligation of that contract. This contention has been definitively addressed and denied by this Court in cases neither cited nor discussed by petitioner.

As this Court stated in *McCormick v. Oklahoma City*, 236 U.S. 657, 660 (1914):

> ". . . [T]he mere fact that a city is a municipal corporation does not give to its refusal to perform a contract the character of a law impairing its obligation. . . ."

See, also, City of Dawson v. Columbia Ave. Savings Fund, 197 U.S. 178, 181 (1905); *Brown v. Colorado*, 106 U.S. 95 (1882).

In *St. Paul Gaslight Co. v. St. Paul*, 181 U.S. 142 (1901), this Court dismissed, for want of federal jurisdiction, a contract clause claim which was brought by the St. Paul Gaslight Co. The alleged contract required the City to pay the interest of the cost of construction of certain unused gaslamps in the city. By resolution, the city required the Gaslight Company to remove the unused lamps and, by further resolution, declared its intent that the City would not pay the contested interest.

In dismissing the contract clause claims, this Court held that the resolution was not a "law" within the meaning of the contract clause because:

"That is to say, it was but a denial by the city of its obligation to pay, and a notice of its purpose to challenge in the future the existence of the duty to make such payment. This denial, while embodied in an ordinance, was no more efficacious than if it had been expressed in any other form, such as by way of answer filed on behalf of the city in a suit brought by the company against the city to enforce what it conceived to be its rights under the contract. When the substantial scope of this provision of the ordinance is thus clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. *But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court. Thus, to reduce the proposition to its ultimate conception is to demonstrate its error.*" Id. 149. (emphasis supplied)

In short, an alleged breach of contract by a municipality does not amount to an unconstitutional impairment of the obligations of contract simply because the municipality's alleged breach takes the form of a resolution authorizing that breach. Such a breach, if it exists, only gives rise to an action to enforce the contract, and it does not create federal jurisdiction under the contracts clause. As Justice Holmes stated in *City of Dawson, supra,* 197 U.S. at 181-2:

"The attempt, by an afterthought, to give jurisdiction by setting up constitutional rights, must fail also. The bill presents a naked case of breach of contract . . . We repeat that something more than a mere refusal of a municipal corporation to perform its contract is necessary to make a law impairing the

obligation of contracts, or otherwise to give rise to a suit under the Constitution of the United States."

Here also the Union has alleged a "naked case of breach of contract." Of course, the Union may bring an action to enforce its § 13(c) agreement. However, since any action to enforce a § 13(c) agreement must be brought in a state court, *Jackson, supra,* the lower courts were correct in dismissing this case.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be denied.

Respectfully submitted,

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No. 82-1602

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IN THE

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OCTOBER TERM, 1982

LOCAL DIVISION 1028, AMALGAMATED TRANSIT UNION,

Petitioner,

v.

THE CITY OF AURORA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1982

LOCAL DIVISION 1028, AMALGAMATED TRANSIT UNION,

Petitioner,

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THE CITY OF AURORA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

In its Petition for a Writ of Certiorari, Petitioner, Division 1028, Amalgamated Transit Union (hereinafter, "Union"), presented the only question decided by the court below: whether this Court's purely statutory decision in *Jackson Transit Authority* v. *Local Division 1285, ATU*, 485 U.S. 15, 102 S. Ct. 2202 (1982), stripped the transit union of any future claims it might have for violation of the contract clause of the United States Constitution, U.S. Const., Art. I, § 10. Having decided that *Jackson* had that preclusive effect, the court below never considered the substance of the Union's claim; accordingly, the Union simply requested this Court to vacate and remand to the lower court for such consideration. Respondent, City of Aurora (hereinafter, "Aurora"), never addresses the only issue actually presented here: Does *Jackson* preclude the lower court from considering the Union's claim that Aurora's actions amounted to a violation of the contract clause? As set forth in the Union's Petition for a Writ of Certiorari, this Court's *Jackson* opinion does not, and could not, decide the Union's contract clause claim, a claim which was never presented to this Court. In its summary opinion, the Court of Appeals did not set forth how *Jackson* did so. Aurora has similarly failed to give this Court any inkling of how the lower court's opinion may be sustained. The opinion is indefensible; accordingly, it should be vacated.

Instead of addressing the question at hand, Aurora contends essentially that the Union would not *win* if the lower court were to consider its contract clause claim. Although, strictly speaking, Aurora's argument that it would prevail in a contract clause suit is irrelevant to the issue presented here, the Union will address it briefly.

Aurora contends first that the lower court's decision here is in "conformity with the decision of other circuits [sic] which have denied the same contract clause claim made by the Union, *Local Div. 589, ATU* v. *Massachusetts*, 666 F. 2d 618 (1st Cir. 1981), *cert. den.*, —— U.S. ——, 102 S. Ct. 2948 (1982)." (Brief in Opposition (hereinafter, "Op. Cert.") at 5).

Local Div. 589 involved a transit authority that had been publicly owned and operated since well before the passage of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601, *et seq.* When the authority first acquired federal funds in 1974, long-standing state law governed the authority's relationship with its employees. The authority and the transit union entered into a § 13(c) Agreement, which provided:

> . . . b) The collective bargaining rights of employees . . . including the right to arbitrate labor disputes . . ., to the extent such are provided for by applicable laws and/or existing collective bargaining agreements, or otherwise shall be preserved and continued . . . . (§ 4)

Id at 625. The state thereafter enacted legislation substantially inconsistent with the bargaining and arbitration arrangements extant in 1974.

Local Div. 589 decided, primarily, that the supremacy clause of the U.S. Constitution did not, as a matter of federal preemption, prevent the state from legislating about collective bargaining rights, including arbitration, covered by the terms of the 1974 § 13(c) Agreement.[1]

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1. *Local Div. 589* was an appeal from the grant of a preliminary injunction. The Court of Appeals vacated the injunction and remanded. On remand, the District Court granted summary judgment to defendants. The Union's appeal from that ruling on the merits is currently pending before the U.S. Court of Appeals for the First Circuit.

On a motion for rehearing, the Court of Appeals addressed the Union's claim that the change in the Massachusetts legislation violated the contract clause by impairing the § 13(c) Agreement in only the briefest and least enlightening terms.[2] The court characterized the issue as a:

> . . . conflict between state law . . . that takes the form of a specific, clear state statute, directly and purposefully aimed at local transit problems (and an ambiguously worded § 13(c) agreement made several years before).

and ruled that:

> . . . such a statute could not have impaired the obligation of the "contract" (if it was one).

Id., at 646.

This cryptic and fact-hedged "ruling" on appeal from a preliminary injunction establishes little of moment here. Most important, since *Local Div. 589* was decided before *Jackson*, the Court could not have held, as the ruling at issue here would establish, that this Court's ruling in *Jackson* strips the § 13(c) contracts of any contract clause protections. Indeed, this Court's ruling in *Jackson*, that § 13(c) Agreements are "ordinary," "enforceable" contracts (*Id.*, 102 S. Ct. at 2207), directly contradicts any such interpretation of *Local Div. 589*. Accordingly, *Local Div. 589* does not support the ruling here.

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2. The Court had considered at length the Union's claim, not presented here, that the legislation violated the unexpired collective bargaining agreement.

For its second defense, Aurora presents a series of contract clause contentions, which would properly be presented to the lower court after remand. Aurora contends that its resolutions are not "laws" within the meaning of the contract clause and that they merely reflect Aurora's position that "the 1971 § 13(c) Agreement was superseded" in 1980. (Op. Cert. at 6-7). As set forth above, these defenses were not the subject of the ruling below and thus are of no moment here.

The Union would point out merely that: (1) As Aurora admits, it is well-established that the official actions of municipalities can constitute "laws impairing contracts" under the Contract Clause. *See St. Paul Gas Light Co.* v. *St. Paul,* 181 U.S. 142, 148 (1901); *City Ry. Co.* v. *Citizens' Street R. Co.,* 166 U.S. 557, 563; *E & E Hauling, Inc.* v. *Forest Preserve Dist.,* 613 F. 2d 675, 678 (7th Cir. 1980).

(2) The existence of a contract, and whether the defendant's actions are "simple breach[es] of contract" (Op. Cert. at 6) or unconstitutional impairments are all complex questions which must be resolved first by the lower federal courts. *City Railroad Co.* v. *Citizens' Railroad Co.,* 166 U.S. 557, 563 (1897):

> All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair.

The Court in *City Railroad* went on to hold unconstitutional a city ordinance terminating the contractual right of an existing street railroad to use the city streets for its tracks. *Accord, St. Paul Gas Light Co.* v. *St. Paul,* 181 U.S. 145, 147:

> Where subsequent state legislation is asserted to be repugnant to the Constitution of the United States because such legislation impairs the obligations of a contract, the power to determine whether there be such impairment imposes also on this court the duty, when necessary, to ascertain whether there was a contract and its import.

Recently, in *E & E Hauling, Inc.* v. *Forest Preserve Dist.*, 613 F. 2d 675, 680, n.7 (7th Cir. 1980), the Seventh Circuit ruled that a plaintiff may maintain a federal contract clause claim against an agency of the state despite the existence of a potential state claim for breach. Thus, it is clear that the Seventh Circuit's ruling here rests solely on its mistaken understanding of *Jackson* and not on any notion that this is "merely" a breach of contract suit, as Aurora contends.

(3) Aurora is wrong; the standards set forth under Aurora's own authority, *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.*, 125 U.S. 18 (1888) (Op. Cert., p. 7), its actions amount to an unconstitutional impairment. As a Home Rule unit under Art. VII, § 6 of the Illinois Constitution, Aurora may "exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt." Exercising these powers, the Aurora City Council legislated as follows: "any labor Agreement in effect prior to said date [5/19/82] *shall terminate* as of that date and have no further force and effect." R. 82-1160 [emphasis added]. This legislated termination could not be further from Aurora's unsupported, self-serving efforts in its brief to recast its actions as mere disputes over the contract's meaning.

CONCLUSION

For the reasons set forth in the Union's Petition for Certiorari, the Writ should be granted.

Respectfully submitted,

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